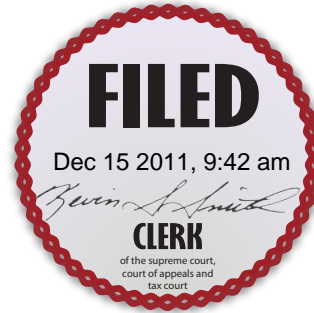


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

IN RE (SUPERVISED) ESTATE OF)
ROBERT E. BRADLEY, DECEDENT,)

PHYLLIS C. BRADLEY,)

Appellant,)

vs.)

MARTHA T. STARKEY,)

Appellee.)

No. 49A02-1103-EU-245

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Gerald S. Zore, Judge
Cause No. 49D08-0810-EU-46934

December 15, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Phyllis C. Bradley appeals the probate court's order on the Emergency Petition to Recover Estate Assets filed by Martha T. Starkey, Successor Personal Representative of the Estate of Robert E. Bradley ("the Estate"), Phyllis' deceased husband. Phyllis raises five issues on appeal, which we consolidate and restate as whether the probate court abused its discretion when it ordered Phyllis to: (1) pay rent to the Estate for living in the marital residence, which was titled in Robert at the time of his death; (2) place \$90,000 into a restricted account; and (3) refrain from selling or in any way encumbering "real estate titled [in] her name."

We affirm.

FACTS AND PROCEDURAL HISTORY

Robert and Phyllis had been married for almost thirty years when Robert died on June 6, 2002. On June 9, 1998, Robert had executed a will in which he bequeathed his entire estate to Phyllis and expressly excluded his children Robert Seay, Tracy Murray, Kristie Ford, and Deborah Bell. However, Phyllis did not attempt to probate Robert's will until 2008. Because more than three years had passed since Robert's death, the probate court did not admit the will to probate.¹ Thus, Robert's estate will be administered and distributed under the laws of intestate succession.

The probate court had initially appointed Phyllis to serve as personal representative of the estate, but on December 21, 2009, Bell, an intervenor, filed a petition to remove Phyllis as personal representative. Following a hearing, the probate

¹ Indiana Code Section 29-1-7-15.1 provides in relevant part that a will "shall not be admitted to probate unless the will is presented for probate" within three years of the individual's death.

court removed Phyllis as personal representative and appointed Bell's attorney, Robert York, and Phyllis' attorney, Patrick Chavis, as co-personal representatives of the estate. The probate court subsequently appointed Martha T. Starkey as Successor Personal Representative.

On November 10, 2010, Starkey filed a Petition to Determine Estate Assets. That petition listed the "Known Assets that are or may be assets of the Estate of Robert E. Bradley, their values, if known, and current claims or assertions from interested persons regarding each asset" in relevant part as follows:

a. Residence at 1626 Country Club Road, Indianapolis, Indiana [(the "marital residence")].

Appraisal by Michael C. Lady conducted on May 4, 2009, stated a fair market value as of the date of the appraisal of \$165,000.00. The initial Personal Representative listed a date of death fair market value of \$127,200. The surviving spouse asserts that the residence is her property. The property appears to be titled in Robert E. Bradley's name alone. The surviving spouse has made improvements to the residence since decedent's date of death.

* * *

c. Medical malpractice suit, claim and settlement.

A medical malpractice lawsuit was filed on March 18, 2002, brought by decedent for injuries he personally incurred and by his wife for damages she incurred as a result of her husband's injuries. Settlement proceeds of approximately \$560,000 were paid to decedent's surviving spouse after the decedent's death, pursuant to Phyllis Bradley's testimony on March 31, 2010. The law firm representing decedent [in] the malpractice lawsuit distributed the settlement proceeds outright and in their entirety to Mrs. Bradley in the later part of 2002. Mrs. Bradley asserts that the malpractice proceeds are her asset.

d. Real Property originally owned by Robert E. Bradley, but claimed by surviving spouse to be owned by her two sons, Kevin and Jason.

Phyllis contends that two parcels were gifted to her sons. A Warranty Deed was recorded on October 31, 2003, for the property located at 8318 Country Charm Drive, Indianapolis, Indiana by Phyllis C. Bradley, Grantor, to Jason R. Bradley, Grantee. The Warranty Deed certifies that Robert Eugene Bradley and Phyllis C. Bradley were husband and wife continuously from the date they acquired title to the above described real estate until the death of Robert Eugene Bradley on June 6, 2002.

Phyllis also contends that her son Kevin received a parcel. Phyllis testified that land was conveyed to her son Kevin. The Successor Personal Representative has not located a Deed conveying land to Kevin, only Deeds conveying property to Jason R. Bradley, Crossman Communities Partnership, and Roger L. Brandon.

Additional title work will likely be needed.

Phyllis believed her name was on the deed because they were married.

e. Fair rental value due the estate for use of the residence.

Deborah S. Bell, by counsel, asserts that the Estate is entitled to FMV rent from the decedent's surviving spouse for the period of time she has resided in the decedent's residence since his date of death.

Appellant's App. at 36-38 (emphasis original, footnotes omitted).

On December 29, Starkey filed a petition to compel Phyllis to post adequate security to protect the value of estate assets. In that petition, Starkey alleged that Phyllis "has had or currently has in her possession or control a number of items of personal and real property which the Successor Personal Representative believes are assets of the Estate of Robert E. Bradley." *Id.* at 53. The petition then listed those alleged assets and their values, including the marital residence (\$165,000); the medical malpractice proceeds (\$560,000); and real estate allegedly gifted to Phyllis' sons. The petition stated further that:

5. The Successor Personal Representative asks the Court to require Phyllis to provide adequate security, in the form of a surety bond, because

many of the assets currently in Phyllis' possession and control are liquid or mobile and she has the ability to spend/gift those assets pending this Court's determination of this Action. In fact, Phyllis' attorney has confirmed that Phyllis has used and may continue to use some of these assets to pay her personal bills and other expenses.

6. The status quo must be maintained in order to preclude the further loss of Estate Assets. Phyllis has had an ongoing obligation to preserve these assets, or, alternatively, if she spends/gifts Estate Assets, she does so at her own risk and is liable for the return of the value of those Assets to the Estate. A surety bond not only protects the Estate, but protects Phyllis' interest in retaining possession of these Assets pending a determination of this action. In this regard, a surety bond truly protects both the status quo and the interests of the parties as this case goes forward.

7. The only alternative to requiring Phyllis to post adequate security is to require Phyllis to return all of these assets to the Estate pending a determination of this action. Phyllis' attorney states it would impose an unnecessary burden on her if she is ordered to return all assets to the Successor Personal Representative. Accepting this attorney representation as true, the Successor Personal Representative is willing to accept a surety bond in the approximate value of Estate Assets.

8. As of the date of this Petition, the parties have been unable to reach an agreement on the requirement or amount of a bond. Accordingly, it will be necessary for the Court to conduct a hearing on this Petition. The Court currently has scheduled a hearing to commence on January 31, 2011.

WHEREFORE, the Successor Personal Representative of the Estate of Robert E. Bradley, by counsel, respectfully asks the Court to order Phyllis Bradley to provide adequate security, in the form of a surety bond, in an amount not less than \$1,010,000.00, and grant the Estate all other appropriate relief.

Id. at 58-59 (emphases added.) On January 12, 2011, Phyllis filed a motion for partial summary judgment on the issue of her alleged ownership of the medical malpractice proceeds. The probate court has not yet ruled on that motion.

On January 31, the probate court held an evidentiary hearing on Starkey's motion to compel Bradley to post security. At that hearing, the parties submitted evidence

related to the values of alleged estate assets and the results of title searches on the real property in question. Phyllis argued that the only asset “at issue here for this bond hearing” was the marital residence. Transcript at 28. Phyllis stated that she had lived in the residence for thirty-five years, had paid the property taxes, had spent money to maintain the residence, and had made the mortgage payments. Finally, Phyllis averred that “discovery is still ongoing [as] to whether her name’s [on] the lot.” Id. at 29. Starkey, however, argued that the total value of the alleged estate assets under Phyllis’ control was \$1,165,500. Following the hearing, the probate court ordered Phyllis to post a bond in the amount of \$1 million.

On February 7, Phyllis filed a motion to reconsider the order on the bond. The probate court did not rule on that motion, and it was deemed denied. Phyllis did not obtain a bond in the amount of \$1 million. On March 11, Starkey filed an emergency petition to recover estate assets, alleging that Phyllis had not complied with the probate court’s order that she obtain a bond. The emergency petition requested that the probate court order Phyllis to: (1) post a \$1 million bond; (2) pay rent to stay in the marital residence; (3) transfer the remaining proceeds from the medical malpractice settlement to Starkey pending a final determination of the estate assets; and (4) refrain from “taking any actions that would encumber or diminish the value of the Residence.” Appellant’s App. at 287. Following a hearing on March 15, the probate court entered its Order on Emergency Petition to Recover Estate Assets stating in relevant part that:

1. Phyllis Bradley shall pay a rental fee of \$1,000 per month to the Estate of Robert E. Bradley and shall continue to reside in the real estate located at 1626 Country Club Road, Indianapolis, IN.

2. Phyllis Bradley shall continue to personally pay all of the taxes, insurance, and upkeep related to and regarding the real estate located at 1626 Country Club Road, Indianapolis, IN.
3. Phyllis Bradley shall place the sum of \$90,000[, the amount left from the medical malpractice award,] of her personal funds into a restricted account and will not withdraw any funds from said account without prior Court order approving that withdrawal.
4. Phyllis Bradley is enjoined from selling or in any way encumbering any and all real estate titled to her name, including the real estate and home located at 1626 Country Club Road, Indianapolis, IN.
5. The Court's Order of February 3, 2011, requiring Phyllis Bradley to post a surety bond in the amount of \$1,000,000.00, with the Clerk of the Court is VACATED.

Id. at 19-20. This appeal ensued.²

DISCUSSION AND DECISION

The question presented in this appeal is whether a probate court may encumber and restrict the use and possession of property held by an heir before a determination has been made that the property is property of the decedent. We agree with the parties that the appropriate standard of review of the probate court's Order on the property issues raised on appeal is abuse of discretion. See, e.g., Konger v. Schillace, 875 N.E.2d 343, 351 (Ind. Ct. App. 2007) (noting review of a trial court's determination of whether a proposed action by a personal representative is in the best interests of an estate is an abuse of discretion); see also In re Estate of Jackson, 938 N.E.2d 1200, 1206 (Ind. Ct. App. 2010) (applying abuse of discretion standard in review of probate court's order that will beneficiaries opposed to sale of real property owned by estate post bond), trans. denied. An abuse of discretion occurs when the trial court's decision is against the logic

² Because the probate court ordered Phyllis to pay rent and place her money in a restricted account, this is an interlocutory appeal as a matter of right under Indiana Appellate Rule 14(A)(1).

and effect of the facts and circumstances before it or it misinterprets the law. Jackson, 938 N.E.2d at 1206.

Phyllis contends that the probate court abused its discretion when it ordered her to pay rent to live in the marital residence, to place the \$90,000 remaining from the medical malpractice award into a restricted account, and to refrain from selling or “in any way encumbering any and all real estate titled to her name.” Appellant’s App. at 19. Phyllis maintains that the ownership of the marital residence and medical malpractice proceeds is disputed and that Indiana Code Section 29-1-13-1 “does not permit [Starkey] to restrict and encumber” the disputed property. Brief of Appellant at 12. That statute provides:

Every personal representative shall have a right to take, and shall take, possession of all the real and personal property of the decedent. The personal representative:

(1) shall pay the taxes and collect the rents and earnings thereon until the estate is settled or until delivered by order of the court to the distributees;

(2) shall keep in tenantable repair the buildings and fixtures under the personal representative’s control;

(3) may protect the buildings and fixtures under the personal representative’s control by insurance; and

(4) may maintain an action:

(A) for the possession of real property; or

(B) to determine the title to real property.

Ind. Code § 29-1-13-1 (emphasis added).

Phyllis contends that the clear and unambiguous language of the statute indicates that the personal representative of an estate is authorized to take possession of the decedent’s real and personal property only after ownership of that property has been

determined. Phyllis contends that because the statute expressly authorizes the personal representative to maintain an action to determine possession of or title to real property in the event that ownership is disputed, a determination that such property is property of the decedent is required before the court can exercise control over the property.³

Starkey counters, however, that because the probate court's order "concerned only securing the likely Estate Assets" pending a determination of ownership, the order does not "invoke" Indiana Code Section 29-1-13-1. Brief of Appellee at 22. Further, Starkey contends that the probate court acted within its jurisdiction "and inherent equitable and legal powers" when it issued the order. Brief of Appellee at 13. In particular, Starkey states that

[a]lthough the Probate Code does not expressly authorize a Probate Court to order an heir to post security against the loss of Estate Assets in that heir's possession pending final judgment on the merits, this is an inherent power of a court of general jurisdiction. In addition, the Probate Code makes clear that the Probate Court "may promulgate rules and forms of procedure for probate proceedings, not inconsistent with the provisions of [the Probate Code] nor with such rules and forms as are promulgated by the supreme court." Ind. Code § 29-1-1-7. Further, "if in any probate proceeding a situation arises which is not provided for by any statute or rule of procedure, the court may formulate and declare a rule of procedure for that particular case." *Id.* As such, the Probate Court is vested with broad discretion and power to take those actions it deems appropriate to properly administer an Estate, protect interests of potential heirs and creditors of the Estate, and protect Estate Assets from loss pending final judgment on the merits.

Brief of Appellee at 13. In sum, Starkey argues that Indiana Code Section 29-1-13-1 is not the only relevant statute and that the probate court has broad powers to secure and

³ We reject Starkey's contention that Phyllis waived her argument regarding Indiana Code Section 29-1-13-1. Phyllis has consistently argued to the probate court that the only disputed asset is the marital residence. She has maintained that there should not be security required with respect to the medical malpractice proceeds or the other disputed property.

encumber real estate and personal property without having first determined that the property is property of the decedent.

The record shows that on January 31, 2011, the probate court conducted an evidentiary hearing on the Successor Personal Representative's petition that Phyllis post security to protect the assets of the Estate. This was a preliminary hearing at which Phyllis appeared in person and by counsel. On February 3, the court ordered that Phyllis post a \$1 million surety bond. After Phyllis failed to provide the bond as ordered, the court vacated its February order and on March 16 entered its Order on Emergency Petition to Recover Estate Assets, which is the subject of this appeal.

We hold that, in addition to a court's inherent equitable powers, Indiana Code Section 29-1-1-7 grants broad equitable powers to a probate court in the administration of a decedent's estate, which necessarily include such orders as may be required to preserve property of the decedent as well as property in which the decedent's interest has not yet been finally determined. Thus, the question here is whether the probate court abused its discretion when it made a preliminary determination to encumber and restrict the use and possession of the marital residence, medical malpractice proceeds, and real property titled in Phyllis' name. We shall consider each in turn.

Residence at 1626 Country Club Road

When Phyllis filed the Inventory in February 2009, she listed the marital residence at 1626 Country Club Road as an asset of the estate. At the January 2011 hearing on the petition to compel Phyllis to post security, Phyllis' counsel explained that Phyllis' "position is that there's really only one asset at issue here for this bond hearing today and

that would be the marital residence[.]” Transcript at 28. In addition to the Inventory, a title search disclosed that this property was titled in Robert’s name at the time of his death. Representative’s Exhibit 2. We hold that the probate court did not abuse its discretion when it ordered Phyllis to pay rent to the Estate pending a final determination of title and distribution of the estate.

Medical Malpractice Proceeds

Phyllis has consistently maintained that she owns the medical malpractice settlement proceeds.⁴ Indeed, in January 2011, she filed a motion for partial summary judgment to establish that she is the exclusive owner of these funds, and Starkey filed a response in March. While Phyllis’ motion, brief and designated documents are in the record, Starkey did not include the Estate’s response in the Appellee’s appendix.

On appeal, Starkey concedes that Phyllis was entitled to a part of the medical malpractice proceeds because she was a co-plaintiff in the lawsuit. The record shows that the original settlement was in gross and made no distinction between Robert’s claim and Phyllis’ claim for loss of consortium, that the claim to the Patient’s Compensation Fund was filed before, but settled after Robert’s death, and that all of the proceeds from that settlement have been distributed to Phyllis.⁵ The probate court has not yet determined

⁴ Throughout the course of these proceedings, Starkey has acknowledged the disputed ownership of the medical malpractice proceeds. Indeed, the money left over from the medical malpractice award has been kept in a bank account owned by Phyllis.

⁵ The settlement proceeds from the suit against the physician were paid to Robert and Phyllis and placed in a joint bank account prior to Robert’s death. The remainder of the payments from that settlement are being paid to Phyllis by an annuity.

ownership of the medical malpractice proceeds.⁶ We hold that there is a bona fide dispute concerning the ownership of these proceeds and that the court did not abuse its discretion when it ordered Phyllis to place the \$90,000 balance remaining into a restricted account.

Other Real Estate

In her petition to determine estate assets, Starkey identified real property owned by the decedent “but claimed by surviving spouse to be owned by her two sons, Kevin and Jason.” Appellant’s App. at 37. But the probate court’s March order does not speak to property allegedly conveyed to her sons. Instead, the probate court’s order enjoins Phyllis from “selling or in any way encumbering any and all real estate titled [in] her name[.]” Id. at 19.

The record shows that Phyllis owns at least three rental properties, and the probate court heard argument that the Estate might need to recover estate assets through the sale of some or all of those properties. We conclude that the probate court did not abuse its discretion when it enjoined Phyllis from selling or in any way encumbering any and all real estate title in her name. While we express no opinion concerning the disposition of any property that Phyllis may hold or occupy, the record is clear that following Robert’s death Phyllis acted without administration for a number of years, and the probate court may ultimately determine that the personal representative should have recourse to real

⁶ The evidence shows that there is a bona fide dispute over ownership of the medical malpractice proceeds, in that the decedent had a property interest in the medical malpractice claim, a chose in action, when he died. See Dusenberry v. Dusenberry, 625 N.E. 2d 458, 462 (Ind. Ct. App. 1993) (a tort claim is a chose in action, a property right recoverable by suit).

estate titled in Phyllis' name in order to settle the estate and make a proper distribution to all of the heirs.

Independent Proceeding

Finally, Phyllis argues, for the first time on appeal, that under the Probate Code, when a decedent's interest in property is disputed or subject to adverse claims, an independent proceeding to adjudicate those matters is required. Phyllis contends, in effect, that the probate court lacks jurisdiction over the property disputes and that the court's March order must be reversed as a matter of law. For support, Phyllis cites Indiana Code Section 29-1-13-10, which provides in relevant part: "Insofar as concerns parties claiming an interest adverse to the estate, such procedure for disclosure or to determine title is an independent proceeding and not with [Indiana Code Section] 29-1-7-2."

Whether a lower court has jurisdiction over a matter is a question of law, which we review de novo. Kondamuri v. Kondamuri, 799 N.E.2d 1153, 1156 (Ind. Ct. App. 2003), trans. denied. The administration of an estate is a single proceeding in rem. Ind. Code § 29-1-7-2; Community Hosps. of Ind., Inc. v. Estate of North, 661 N.E.2d 1235, 1240 (Ind. Ct. App. 1996), trans. denied. But when adverse claims are not resolved by agreement, a civil action may be required to resolve the dispute. See Ind. Code § 29-1-13-10; see also Blake v. Blake, 181 Ind.App. 304, 391 N.E.2d 848, 854 (1979).

Nevertheless, a probate court is also a court of general jurisdiction. See Community Hosps. of Ind., Inc., 661 N.E.2d at 1239. And during the course of the administrative proceeding, collateral proceedings may occur which are adversarial in

nature and result in separate decisions finally adjudicating the rights of interested persons. Id. at 1241. Moreover, here, Phyllis invoked the probate court's jurisdiction to determine ownership of the medical malpractice proceeds when she filed her motion for partial summary judgment with the court. A party who seeks affirmative relief from a court may be estopped from challenging the court's jurisdiction. See Allen v. Proksch, 832 N.E.2d 1080, 1096-97 (Ind. Ct. App. 2005) (holding a party shall be estopped from challenging the court's jurisdiction where the party has voluntarily availed itself or sought the benefits of the court's jurisdiction). To the extent Phyllis contends that the probate court does not have jurisdiction to determine ownership of the malpractice proceeds, she is estopped from such contention.

Moreover, the March order appealed from concerns only security for disputed estate assets and is not a determination of title to property. The personal representative's petition to determine estate assets, which was also filed with the probate court without objection by Phyllis, is pending. For that matter, to date, Phyllis has not contested the probate court's jurisdiction to determine ownership of the disputed estate assets. And the probate court has jurisdiction to rule on the petition to determine estate assets absent a specific and timely objection to the court's jurisdiction. See Community Hospitals of Indiana, Inc. v. Estate of North, 661 N.E.2d 1235, 1239 (Ind. Ct. App. 1996), trans. denied. Phyllis has not shown that the probate court lacks subject matter jurisdiction, or jurisdiction over the property disputes, or that an independent proceeding is required before the court can enter a preliminary order securing disputed estate assets.

Conclusion

Indiana Code Section 29-1-13-1 provides in relevant part that the personal representative shall have a right to take, and shall take, possession of all the real and personal property of the decedent. It follows that in some cases, as here, a personal representative may need to preserve and protect assets in which the decedent has or appears to have a property interest at the time of his death until the property rights of the heirs have been determined. As a fiduciary for the estate, a personal representative is not required to wait until the property has been conveyed or dissipated. Thus, the court's order entered March 16, 2011, is a preliminary order to maintain the status quo and falls well within the authority of a probate court under the Probate Code and the inherent authority of a court to maintain the status quo pending a final adjudication.

Here, there is ample evidence to support a preliminary conclusion that the marital residence is property of the decedent, and the probate court did not abuse its discretion when it ordered that Phyllis pay rent to the Estate while she lives there. And the probate court did not abuse its discretion when it ordered Phyllis to place \$90,000 into a restricted account until ownership of the malpractice proceeds has been determined. And, finally, the probate court did not abuse its discretion when it enjoined Phyllis from selling or encumbering real estate titled in her name until the property of the decedent and the rights of the heirs have been determined.

Affirmed.

RILEY, J., and MAY, J., concur.